

When the hegemon goes rogue: leadership amid the US assault on the liberal trading order

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For over 70 years, US support for multilateral institutions has been a cornerstone of the liberal international economic order (LIEO).¹ Nowhere is this more apparent than in the trade regime. As the dominant state in the international system, the United States played a central role in leading the construction of an open and rules-based multilateral trading system.² The American hegemon ‘ran the system’, providing leadership and facilitating cooperation among states.³ The rules of the multilateral trading system played a key role in fostering increasing economic integration and creating stable conditions for the functioning of global markets.

Under President Trump, however, the United States not only abandoned its traditional leadership role in the multilateral trading system but launched an assault on the very system it had created and led.⁴ Discarding any commitment to multilateral cooperation or respect for the rule of law, the United States openly embraced the raw use of coercive power in trade: this included arbitrarily imposing tariffs on all of its major trading partners, launching a trade war with China, and threatening to withdraw from trade agreements to strong-arm other states into making concessions to its own interests. In short, the world’s dominant power began behaving as a rogue state in the multilateral trading system. The American hegemon’s blatant violation of the rules and principles of the multilateral trading system, combined with its repeated threats to withdraw from the WTO, plunged the latter—the primary institution intended to ensure stable and orderly trading relations in the global economy—into an existential crisis.

In what constituted the most immediate and acute threat to the trade regime, the United States blocked appointments to the Appellate Body—which acts effectively as a supreme court for global trade—throwing the WTO’s dispute settlement mechanism (DSM) into jeopardy. That system is widely considered the

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¹ Joseph S. Nye, Jr, ‘The rise and fall of American hegemony from Wilson to Trump’, *International Affairs* 95: 1, 2019, pp. 63–80.

² Amrita Narlikar, ‘Negotiating the rise of new powers’, *International Affairs* 89: 3, 2013, pp. 561–76; James Scott, ‘The future of agricultural trade governance in the World Trade Organization’, *International Affairs* 93: 5, 2017, pp. 1167–84; Rorden Wilkinson, ‘Back to the future: “retro” trade governance and the future of the multilateral order’, *International Affairs* 93: 5, 2017, pp. 1131–47.

³ G. John Ikenberry, ‘The future of multilateralism: governing the world in a post-hegemonic era’, *Japanese Journal of Political Science* 16: 3, 2015, p. 409.

⁴ Daniel W. Drezner, ‘Immature leadership: Donald Trump and the American presidency’, *International Affairs* 96: 2, 2020, pp. 383–400.

crown jewel of the multilateral trading system. Its creation in 1995 represented the legalization of international trade, with states agreeing to be bound by international trade rules and delegating authority to a (de facto) international court to arbitrate disputes and enforce those rules.⁵ The WTO has one of the strongest enforcement mechanisms of any international institution. While most international law is ‘soft law’—legal instruments with little or no legally binding force—the WTO has the authority to make ‘hard law’—legal obligations that are binding on states.⁶ Trade disputes are adjudicated by WTO dispute settlement panels, whose decisions are binding, subject to appeal before the Appellate Body, whose decisions are also binding. Appellate review is thus a crucial part of the WTO dispute settlement system. The WTO’s DSM is the most frequently used global dispute settlement system in the history of international law, having heard over 600 cases since its creation,⁷ and has made the WTO one of the most powerful and important institutions in global economic governance.⁸ The legalized DSM has also helped to level the playing field by ensuring that weaker states have recourse to legal remedies in their trading relations with more powerful states.⁹

The WTO’s DSM is a fundamental pillar of the rules-based multilateral trading system: it is essential to enforcing global trade rules and providing a peaceful means of resolving trade disputes among states. Yet the United States has expressed growing dissatisfaction with the Appellate Body over the past two decades, and began selectively blocking the reappointment of judges under the Obama administration. Under the Trump administration, the US began blocking *all* appointments to the Appellate Body, leaving it without any judges to adjudicate disputes. The United States thus rendered the Appellate Body inoperable, making it possible for states to block the adoption of WTO panel rulings. The WTO risks reversion to the older and much less effective system of dispute settlement that existed under the GATT, where rulings could only be adopted by consensus, meaning that the losing party to a dispute could block the ruling.¹⁰ Despite the election of President Biden, there are still no signs of an imminent resolution to the Appellate Body impasse on the horizon. Without a functional dispute settlement system to ensure the WTO’s rules are enforced, the entire system of multilateral trade rules is in danger of unravelling.

⁵ Nitsan Chorev, *Remaking US trade policy* (Ithaca, NY: Cornell University Press, 2008); Joseph A. Conti, *Between law and diplomacy* (Stanford, CA: Stanford University Press, 2011); Gregory Shaffer, *Emerging powers and the world trading system: the past and future of international economic law* (Cambridge: Cambridge University Press, 2021).

⁶ Simon Lester, ‘Can interim appeal arbitration preserve the WTO dispute system?’, *Cato Institute Bulletin*, no. 77, 2020, p. 1. If a state is found to be in violation of WTO rules, it is required to bring the offending measure into compliance with WTO rules. If it fails to do so, it must negotiate a settlement to compensate affected states, or face lawful retaliation. Compliance with WTO rulings is very high, at 85–95%. See Valerie Hughes, ‘Working in WTO dispute settlement’, in Gabrielle Marceau, ed., *A history of law and lawyers in the GATT/WTO: the development of the rule of law in the multilateral trading system* (Cambridge: Cambridge University Press, 2015), pp. 400–423.

⁷ Ernst Ulrich Petersmann, *Rule-of-law in international trade and investments? Between multilevel arbitration, adjudication and judicial overreach*, working paper (Florence: European University Institute, Oct. 2020).

⁸ David Lake, ‘Leadership, hegemony, and the international economy: naked emperor or tattered monarch with potential?’, *International Studies Quarterly* 37: 4, 1993, pp. 459–89.

⁹ Conti, *Between law and diplomacy*.

¹⁰ The WTO’s DSM was intended to prevent this by making the adoption of rulings automatic (requiring a consensus among WTO members—including the victorious party—to reject a ruling).

With the trade regime in crisis, a key question has been whether other states would have the will and capacity to lead system-preserving initiatives. While most attention has focused on whether China—widely seen as the chief hegemonic challenger to the US—would assume the mantle of leadership,¹¹ there has been considerable scepticism about the EU's capacity to exercise leadership in this crisis.¹² Despite its economic might and role as a major power in the trading system, the EU has generally been seen as punching below its weight in terms of leadership at the WTO.¹³

On the contrary, in this article I argue that, confronted with a significant threat to the liberal trading order, it was the EU, rather than China, that led efforts to rescue the system. Despite all the attention given to China's rise as a prospective global hegemon, it was not China but the EU that took responsibility for exercising leadership at the WTO. While China may want to preserve the existing order, it lacks the capacity to lead system-preserving initiatives. Successful leadership in the multilateral trading system requires advancing initiatives that are able to gain the backing of other states. As I will show, the EU took the lead in advancing concrete initiatives directed at defending and protecting the rules-based trading system against the Trump threat, and was able successfully to mobilize states to support its initiatives. The EU led efforts to address the Appellate Body crisis, spearheading the creation of an interim appeals arrangement—the multi-party interim appeal arbitration arrangement (MPIA)—to replace the now defunct Appellate Body. In effect, the EU created an 'Appellate Body minus the United States', encompassing most of the world's major trading powers and users of the WTO's dispute settlement mechanism.

In existing scholarship on the US-led LIEO, Europe has typically been characterized as a junior partner, supporting initiatives led by the American hegemon.¹⁴ But what this analysis shows is that, in a moment of intense upheaval in the trading system, with the United States intentionally sabotaging the established order, the EU took on an important system-preserving, or order-preserving, function in the LIEO. The EU's actions were akin to triage in battlefield medicine—trying to patch up and salvage the rules-based multilateral trading system that had come

¹¹ Karen J. Alter, Emilie M. Hafner-Burton and Laurence R. Helfer, 'Theorizing the judicialization of international relations', *International Studies Quarterly* 63: 3, 2019, pp. 449–63; Marcia Don Harpaz, 'China and the WTO: on a path to leadership?', in Ka Zeng, ed., *Handbook on the international political economy of China* (Cheltenham: Edward Elgar, 2019), pp. 260–80; Weinian Hu and Jacques Pelkmans, *China–EU leadership in globalisation: ambition and capacity*, CEPS Policy Insights no. 2017/18 (Brussels: Center for European Policy Studies, 2017).

¹² Christina Davis, 'It is up to China to save the global trading system', *Financial Times*, 9 March 2018; Caroline Fehl and Johannes Thimm, 'Dispensing with the indispensable nation? Multilateralism minus one in the Trump era', *Global Governance* 25: 1, 2019, pp. 23–46.

¹³ Anders Ahnliid and Ole Elgström, 'Challenging the European Union: the rising powers and the USA in the Doha Round', *Contemporary Politics* 20: 1, 2014, pp. 77–89; Ole Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations', *Journal of Common Market Studies* 45: 4, 2007, pp. 949–67; Karen Smith, 'Can the European Union be a pole in a multipolar world?', *International Spectator* 48: 2, 2013, pp. 114–26; Michael Strange, 'Power in global trade governance: is the EU a unitary actor, a tool for dominance, or a site of contestation?', *International Journal of Public Administration* 38: 12, 2015, pp. 884–94.

¹⁴ G. John Ikenberry, 'The end of liberal international order?', *International Affairs* 94: 1, 2018, pp. 7–23; Lake, 'Leadership, hegemony, and the international economy'; Christopher Layne, 'The US–Chinese power shift and the end of the Pax Americana', *International Affairs* 94: 1, 2018, pp. 89–111.

under active attack from the American hegemon, and to prevent US actions from destroying the system. While the MPIA is merely a stopgap measure, and a partial and imperfect one at that, it does represent a crucial step in attempting to maintain a functional WTO dispute settlement system, without which global trade rules risk becoming unenforceable. Amid a backlash against the liberal trading order from the most powerful state in the system, I argue that it is the EU, not China, that has assumed the role of a 'system-preserving power'—that is, a power that seeks to maintain and defend the established global order.¹⁵

What happens when the hegemon sabotages the established order?

A key question has been whether it would be possible to maintain the functioning of the multilateral trading system without the participation or leadership of the American hegemon. Historically, American hegemony played a vital role in the creation and maintenance of the liberal order.¹⁶ Hegemonic stability theory assumes that an open and rules-based multilateral trading system requires a hegemonic leader to underwrite it.¹⁷ Yet International Relations scholars have been debating the possibilities for 'non-hegemonic cooperation' to maintain international order since the 1970s and 1980s, when signs of a decline in US hegemony first began to emerge.¹⁸ The endurance of established governance regimes despite a decline in the relative power of the United States raised questions about whether institutional cooperation could withstand the decline of a hegemon. Scholars have sought to understand whether states could cooperate in the absence of a hegemon to maintain and enforce order.¹⁹ There has been considerable interest in analysing the conditions under which non-hegemonic cooperation is feasible and effective, and the factors that could make such cooperation possible in the absence of US leadership. One of the key conditions scholars have identified is whether alternative leaders are available.²⁰ As Caroline Fehl and Johannes Thimm put it:

Are other key players in the policy area interested in preserving or advancing existing multilateral institutions, or do they prefer unilateral action or alternative institutions that could challenge or undermine existing fora? Are they willing to challenge US hegemonic leadership? And if so, are they able to form a coalition that is large and stable enough to fill the leadership vacuum left by the former hegemon?²¹

¹⁵ James Scott and Rorden Wilkinson, 'China as a system preserving power in the WTO', in Dries Lesage and Thijs Van de Graaf, eds, *Rising powers and multilateral institutions* (London: Palgrave Macmillan, 2015), p. 199.

¹⁶ Ikenberry, 'The future of multilateralism'.

¹⁷ Charles P. Kindleberger, 'Dominance and leadership in the international economy: exploitation, public goods, and free riders', *International Studies Quarterly* 25: 2, 1981, pp. 242–54; Stephen D. Krasner, 'State power and the structure of international trade', *World Politics* 28: 3, 1976, pp. 317–47.

¹⁸ Fehl and Thimm, 'Dispensing with the indispensable nation?', p. 25.

¹⁹ Robert Keohane, *After hegemony: cooperation and discord in the world political economy* (Princeton: Princeton University Press, 1984); Lake, 'Leadership, hegemony, and the international economy'; Duncan Snidal, 'The limits of hegemonic stability theory', *International Organization* 38: 4, 1985, pp. 579–614.

²⁰ Stefan Brem and Kendall W. Stiles, *Cooperating without America* (Abingdon: Routledge, 2009); Fehl and Thimm, 'Dispensing with the indispensable nation?'.

²¹ Fehl and Thimm, 'Dispensing with the indispensable nation?', p. 29.

The question of whether other major powers would have the will and capacity to lead system-preserving initiatives became one of acute urgency amid the threat to the LIEO posed by recent US policies. In this case, the problem was not simply hegemonic decline—with a relative decline in US power alongside the rise of China—but active sabotage by the American hegemon of the established system of global trade governance.

There has been much speculation about whether China—which, as noted above, is widely considered the principal hegemonic rival to the United States—would ‘take up the mantle of multilateralism’ shed by America under President Trump.²² China is widely seen as a supporter of the status quo in the global trade regime: as the world’s largest trader, it has been a major beneficiary of, and has a keen interest in maintaining, the relatively open global trading order.²³ President Xi Jinping’s speech defending economic globalization and free trade at the 2017 World Economic Forum in Davos, three days before Trump’s inauguration, garnered international headlines and was widely seen as signalling China’s intention to step forward to fill the gap left by the abdication of US leadership. According to trade scholar Christina Davis, writing in the *Financial Times*, ‘it is up to China to save the global trading system’:

China offers the last hope for reviving the WTO. With the Americans rejecting a leadership role and the Europeans mired in a populist backlash, China has an opportunity to step forward. ... Exports remain central to Chinese economic growth ... It would be the biggest loser from the death of the WTO.²⁴

China has indeed touted its ‘leadership’ at the WTO and sought to position itself as a ‘defender’ of the liberal trading order, its officials asserting that China has taken a ‘stand for multilateralism and free trade, and called on the international community to maintain the multilateral trading system and oppose unilateralism and protectionism’.²⁵ However, it is not enough for a state to simply *assert* that it is a leader—such claims need to be backed up by action; and while China has been eager to claim leadership, those rhetorical claims have not been matched in deed. Despite its professed commitment to defending the multilateral trading system, China, as the following analysis will show, lacks the will or capacity to play a system-preserving role in the liberal trading order.

In contrast, many have been sceptical about the EU’s capacity for leadership in this crisis. Beset by repeated internal threats—from the eurozone crisis to Brexit—the EU has been seen as distracted and weakened by internal divisions and challenges that hamper its potential to lead.²⁶ Moreover, scepticism about the EU’s potential for leadership has also been fuelled by its previous track record and the perception

²² Alter et al., ‘Theorizing the judicialization of international relations’; Harpaz, ‘China and the WTO’; Hu and Pelkmans, *China–EU leadership in globalisation*.

²³ China is also seen as a potential counterbalance to the dominant American perspective on the appropriate relationship between states and markets. See Scott and Wilkinson, ‘China as a system preserving power in the WTO’.

²⁴ Davis, ‘It is up to China to save the global trading system’.

²⁵ Hannah Monicken, ‘China trumpets claims of WTO leadership in 2019’, *Inside US Trade*, 6 Jan. 2020.

²⁶ Davis, ‘It is up to China to save the global trading system’.

that, relative to its economic and political clout, it has generally underperformed as a leader on the international stage. According to Fehl and Thimm, for instance:

There is no single country or region that can replace US leadership. The EU, with its experience with supranational governance and its professed commitment to advancing the multilateral order, would be one important piece to the puzzle, but it keeps punching below its weight.²⁷

Despite its economic might and considerable influence in the trade regime, then, the EU's leadership performance has been widely seen as disappointing, owing to internal divisions and difficulties in securing followers.²⁸ There have thus been serious doubts about the EU's ability to exercise leadership amid the abdication of American leadership and the US assault on the trading system.

The EU: leadership laggard?

Given its size and economic importance, the EU is undoubtedly a major actor in the international trading system. In terms of the scale of its internal market, it is on a par with the United States. Its economic weight has given the EU considerable influence in shaping bargaining and outcomes at the GATT and then the WTO,²⁹ as well as in a multitude of bilateral trade agreements.³⁰ But economic might does not necessarily translate into leadership.³¹ Leadership is not synonymous with influence; it does not simply refer to an actor who makes, or breaks, decisions.³² Rather, leadership in multilateral negotiations refers to 'an asymmetrical relationship ... in which one actor guides or directs the behavior of others towards a certain goal over a certain period of time'.³³ A leader must have a vision, develop concrete initiatives, mobilize the support of other states, build coalitions to advance its initiatives and propel negotiations towards its vision.³⁴ Most importantly, leadership requires followers: 'Successful leadership depends not only on resources and ambition but also crucially on the support of followers.'³⁵

By this measure, the EU has generally been seen as underperforming at the WTO. Ole Elgström's study of perceptions of the EU among WTO members

²⁷ Fehl and Thimm, 'Dispensing with the indispensable nation?', p. 40.

²⁸ Ahnliid and Elgström, 'Challenging the European Union'; Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations'; Smith, 'Can the European Union be a pole in a multipolar world?'; Strange, 'Power in global trade governance'.

²⁹ Richard Steinberg, 'In the shadow of law or power? Consensus-based bargaining in the GATT/WTO', *International Organization* 56: 2, 2002, pp. 339–74.

³⁰ Mark Langan, 'Normative power Europe and the moral economy of Africa–EU ties: a conceptual reorientation of "normative power"', *New Political Economy* 17: 3, 2012, pp. 243–70; Gabriel Siles-Brügge, *Constructing European Union trade policy* (Basingstoke: Palgrave Macmillan, 2014); Silke Trommer, *Transformations in trade politics* (Abingdon: Routledge, 2014).

³¹ Kristen Hopewell, 'The BRICS—merely a fable? Emerging power alliances in global trade governance', *International Affairs* 93: 6, 2017, pp. 1377–96.

³² Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations'.

³³ A. Underal, 'Leadership theory: rediscovering the arts of management', in I. W. Zartman, ed., *International multilateral negotiation* (San Francisco: Jossey-Bass, 1994), p. 178.

³⁴ G. Sjöstedt, ed., *International environmental negotiations* (Newbury Park, CA: Sage, 1993).

³⁵ Stefan Schirm, 'Leaders in need of followers: emerging powers in global governance', *European Journal of International Relations* 16: 2, 2010, p. 199.

found that while the EU is 'seen as a key actor in the WTO ... it is not necessarily seen as a leader'.³⁶ Indeed, the EU 'is hardly perceived to provide visionary leadership or guidance'.³⁷ This is not to say that the EU has not tried to assume the role of a leader; but there has been a significant gap between the EU's aspiration for leadership and its ability to achieve it. Its leadership potential has been diminished by a lack of perceived legitimacy, as well as its own internal coordination problems.

During the Doha Round, for instance, the EU sought to exercise leadership by presenting itself as a leader of the development agenda in global trade. Its efforts failed, however, owing to a lack of credibility and the inability to gain followers.³⁸ Its claim to be a champion of development was contradicted by its protectionist policies, particularly in agriculture, and its heavy-handed tactics in trade negotiations with developing countries.³⁹ Its agenda was seen as self-serving, driven by its own commercial interests rather than the needs of developing countries. The EU's efforts to establish leadership by portraying itself as a moral voice for global development and an advocate for the interests of the developing world were undermined by the perceived hypocrisy of this self-portrait and the fact that developing countries strongly opposed many of the initiatives the EU was actually advancing.⁴⁰ Opposition from developing countries ultimately thwarted much of the EU's agenda for the round, including its proposals on labour, environment, competition policy, investment and public procurement.

The EU's leadership ambitions have also been hindered by its unique nature as an actor in the international system. On trade, unlike other areas of global governance such as the environment, the EU has exclusive competence to act for its member states, meaning that it has the authority to negotiate international agreements and speak as a single voice at the WTO. Trade is therefore the area where we might expect the EU to have the greatest capacity for leadership. Yet the EU has frequently been described as a 'conflicted trade power' owing to the difficulties of arriving at a common negotiating position among its member states, which often disagree on trade policy.⁴¹ Such internal divisions have undermined the EU's capacity for leadership at the WTO.⁴² Given the challenges of coordinating trade policy among its diverse member states, as Laatikainen and Smith put it, 'the EU spends most of its time negotiating with itself'.⁴³ The EU's 'unwieldy, slow, and time-consuming' internal coordination process—which was strikingly illustrated,

³⁶ Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations', p. 950.

³⁷ Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations', p. 963.

³⁸ Ahnliid and Elgström, 'Challenging the European Union'; Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations'; Smith, 'Can the European Union be a pole in a multipolar world?'; Strange, 'Power in global trade governance'.

³⁹ Siles-Brügge, *Constructing European Union trade policy*; Trommer, *Transformations in trade politics*.

⁴⁰ Langan, 'Normative power Europe and the moral economy of Africa-EU ties'; Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a conflicted trade power', *Journal of European Public Policy* 13: 6, 2006, pp. 906–925.

⁴¹ Meunier and Nicolaïdis, 'The European Union as a conflicted trade power', p. 907.

⁴² Elgström, 'Outsiders' perceptions of the European Union in international trade negotiations'; Strange, 'Power in global trade governance'.

⁴³ K. V. Laatikainen and K. Smith, eds, *The European Union at the United Nations: intersecting multilateralisms* (Basingstoke: Palgrave Macmillan, 2006), p. 20.

for instance, in the controversy over the Canada–EU Comprehensive Economic and Trade Agreement (CETA)—often leaves little attention for working with, or seeking to lead, other states.⁴⁴

Despite its previously lacklustre leadership performance, however, and in contrast to prevailing expectations, this article will show that the EU emerged as a crucial leader in efforts to salvage the multilateral trade regime. In the face of the unifying threat of Trump's policies, the EU was able to overcome internal disagreements to advance a proactive agenda in response to the Appellate Body crisis. The EU's capacity for leadership was in part a function of the specific nature of this crisis. That leadership was directed towards preserving the status quo—seeking to replicate and preserve established WTO dispute settlement procedures by creating an interim appeals arrangement to replace the defunct Appellate Body. The creation of the MPIA did not involve driving forward the liberalization of trade, undertaking any new commitments or making new commercial concessions that would require negotiation with the EU's member states. Articulating a clear vision—centred on the importance of maintaining a rules-based multilateral trading system—that strongly resonated with other states, the EU put forward a concrete initiative to address the crisis. It was able to secure the support of other states and build a successful coalition to advance its initiative.

While its attempts to demonstrate leadership in the Doha Round were hampered by a credibility problem that impeded its ability to secure followers, the EU has been particularly well suited to lead in the current crisis. As Elgström found in his study of perceptions of the EU among WTO members over a decade ago,

the one area where the EU receives most credit is as a protagonist of multilateralism. The Union is widely praised for its strong support of multilateral trade arrangements and is described as a key actor in this respect. A contrast is often made between the multilateralist EU and the unilateralist US, ... not only referring to trade but also to other policy areas. The perceived legitimacy of EU multilateralism is a potential asset, which could form the basis for leadership.⁴⁵

Given its reputation as a multilateralist, in the face of Trump's assault on the WTO the EU had the credibility as a leader of efforts to preserve the multilateral trading system that it had lacked in trying to present itself as a leader of the Doha development agenda. The EU's primary foreign policy objective has been the pursuit of a negotiated global order, based on a commitment to multilateralism, integrative negotiations, and the creation of rules and liberal regimes—which are the cornerstones of the EU project itself.⁴⁶ As Michael Smith states, the EU has displayed a marked and consistent 'preference for multilateralism, for negotiation and above all for stability'.⁴⁷ With the liberal trading order under threat from the United States, the EU's leadership in pursuing these goals at the WTO proved immensely attractive to other states. The magnitude of the threat to the stability of the system, and thus to EU interests, galvanized the EU and enabled it to overcome internal

⁴⁴ Michael Smith, 'Beyond the comfort zone: internal crisis and external challenge in the European Union's response to rising powers', *International Affairs* 89: 3, 2013, pp. 653–71; Ahnliid and Elgström, 'Challenging the European Union'.

divisions in order to take action and assume leadership. In contrast to its failed leadership attempts in the past, in the current crisis the EU advanced objectives that have strong support from other states and put forward concrete initiatives directed at maintaining the rules-based multilateral trading system.

The Appellate Body crisis

America's aggressive unilateral trade actions have blatantly violated the rules and principles of the WTO and posed a severe threat to the stability of the trade regime and indeed the global economy. Perhaps the most urgent threat to the WTO took the form of the US disabling the institution's DSM by blocking appointments to the Appellate Body. The Appellate Body hears appeals of decisions by WTO dispute settlement panels, and as such is a crucial part of the dispute settlement system. Since its creation, more than two-thirds of WTO disputes have been appealed and reached the Appellate Body.⁴⁸ However, in mid-2017 the United States began blocking all new appointments to the Appellate Body as the terms of its judges (referred to as Appellate Body 'members') expired. There are a total of seven seats on the Appellate Body, and it requires a minimum of three judges to form a panel to adjudicate a dispute. Since December 2019, with six of its seven seats vacant, the Appellate Body has not had enough judges to adjudicate disputes. Since December 2020, indeed, all seven of its seats have been vacant. By blocking Appellate Body appointments, the United States imperilled the WTO's entire mechanism for settling disputes: if appealed, a dispute settlement panel decision is blocked—and will not become legally binding—until a decision of the Appellate Body. Consequently, without a functioning Appellate Body to hear the case, the country ruled against in a dispute can block adoption of the panel decision simply by filing an appeal. This has come to be known as appealing 'into the void'.

The seeds of this crisis in the dispute settlement system were planted before Trump's presidency. The United States began complaining about the Appellate Body in the early 2000s, after it ruled against the United States on several cases involving its controversial methodology ('zeroing') for calculating anti-dumping duties used to block imports.⁴⁹ Under President Obama, the United States started blocking Appellate Body reappointments. Appellate Body members are appointed by consensus for a four-year term, which can be renewed once. By unwritten tradition, reappointment is usually automatic. Yet in an unprecedented move in 2011, the United States blocked the reappointment of its own appointee, Jennifer Hillman, for a second term, because the administration was displeased that she had not upheld US protectionist measures challenged in WTO disputes. Then, in 2016, the United States blocked the reappointment of South Korean judge Seung Wha Chang, because it disagreed with Appellate Body decisions in which he had participated. By refusing to reappoint judges who made decisions that did not conform to US wishes, the United States drew universal condemnation from other WTO

⁴⁸ Lester, 'Can interim appeal arbitration preserve the WTO dispute system?.'

⁴⁹ 'Zeroing' makes it easier to find evidence of dumping and inflates the resulting anti-dumping duties.

members, which viewed its actions as a serious threat to the independence and impartiality of the Appellate Body.⁵⁰

Under President Trump, however, the United States took this approach to a new extreme by blocking all appointments to the Appellate Body, incapacitating the WTO's enforcement mechanism. Washington has articulated a lengthy list of procedural complaints about the Appellate Body.⁵¹ More fundamentally, however, the United States accuses the Appellate Body of judicial overreach and complains that it has interpreted WTO rules in ways that run counter to American interests.⁵² The United States is dissatisfied with several Appellate Body rulings that concern China's trade policies and America's ability to use trade defence measures to restrict imports. It criticizes the Appellate Body for prohibiting its use of zeroing in calculating anti-dumping duties and prohibiting double remedies (simultaneously imposing both anti-dumping and countervailing duties). It also criticizes the Appellate Body for interpreting the definition of 'public body' too narrowly, limiting the application of WTO subsidy rules to China's state-owned enterprises.⁵³ The deeper issue is that the United States is dissatisfied not simply with the Appellate Body but with the WTO itself—for failing to address China's 'state capitalism', discipline its allegedly 'unfair' trading practices and thus contain the threat to American hegemony posed by a rising China.⁵⁴ The United States has signalled that it has little interest in reform of the Appellate Body until its systemic concerns regarding China's trade policies are addressed.

As a result, the United States has been unwilling to provide any proposals for reforming the Appellate Body. It has refused even to discuss potential solutions, or engage with the proposals put forward by other states. In February 2020, the United States released a lengthy 174-page report detailing its complaints about the Appellate Body—but offered no solutions.⁵⁵ Indeed, the Trump administration's US Trade Representative Robert Lighthizer stated that if the Appellate Body 'never goes back into effect that would be fine'.⁵⁶ Without a functional Appellate Body, the United States can simply block rulings against it by appealing into the void—as it did in September 2020 after losing a dispute with Canada over softwood lumber, and in October 2020 when a WTO panel determined that its

⁵⁰ Author interviews with WTO negotiators, Geneva, July 2017.

⁵¹ The US claims that the Appellate Body has exceeded its authority and acted outside the mandate established by WTO member states by: (1) exceeding the 90-day deadline set out for the completion of appeals; (2) allowing Appellate Body members whose terms expire to finish the appeals on which they were working; (3) reviewing panel findings of fact, exceeding its authority to review only legal issues; (4) rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute; (5) claiming that its reports are entitled to be treated as binding precedent and must be followed by panels; (6) refusing to recommend that a country bring a WTO-inconsistent policy into compliance with WTO rules, if it has already removed the offending measure; and (7) opining on matters within the authority of other WTO bodies. See Office of the US Trade Representative (USTR), *Report on the Appellate Body of the World Trade Organization* (Washington DC, 2020).

⁵² USTR, *Report on the Appellate Body of the World Trade Organization*.

⁵³ Shaffer, *Emerging powers and the world trading system*.

⁵⁴ US, 2017 *Report to Congress on China's WTO compliance* (submitted to WTO General Council, 16 July 2018), WT/GC/W/746, p. 3.

⁵⁵ USTR, *Report on the Appellate Body of the World Trade Organization*.

⁵⁶ Hannah Monicken and Maria Curi, 'Grassley: administration would need congressional approval to change bound tariffs', *Inside US Trade* daily report, 14 Feb. 2020.

Section 301 tariffs on China violated WTO rules.⁵⁷

Other WTO members have expressed ‘grave concern’ about the Appellate Body blockage, describing it as an ‘alarming crisis’ with ‘damaging consequences’.⁵⁸ In meetings of the WTO Dispute Settlement Body, the EU representative emphasized that ‘a properly functioning WTO dispute settlement system [is] of crucial importance for rules-based international trade’, and that an impartial appeals process is one of its essential features.⁵⁹ Nigeria, on behalf of the African Group, described the Appellate Body as ‘the fundamental pillar of the WTO and the multilateral trading system’.⁶⁰ Canada stressed the crucial role of the Appellate Body in preserving ‘the security and predictability of the multilateral trading system’.⁶¹ Washington’s actions have been starkly condemned. As Mexico stated, there is ‘no legal justification’ for the Appellate Body blockage, which has caused ‘concrete nullification and impairment’ of the rights of WTO member states: ‘The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body should not serve as a pretext to undermine and disrupt its work as well as the work of the dispute settlement system.’⁶² WTO members have identified restoring the Appellate Body as a ‘paramount priority’ and have repeatedly stressed ‘the urgency of the situation’.⁶³ Yet despite 121 WTO members petitioning the United States to unblock Appellate Body appointments, it has refused to comply.⁶⁴ There are widespread fears, as China summarized, that the Appellate Body crisis will lead to ‘the collapse of the WTO dispute settlement system’, which would ‘fundamentally destroy the multilateral trading system’.⁶⁵ Without a functioning dispute settlement mechanism, the trading system risks descending into the rule of the jungle.

EU leadership in the Appellate Body crisis

With the multilateral trading system under threat, the EU launched efforts to ‘save the WTO’ and maintain the continued functioning of the liberal trading order.⁶⁶ The EU stepped in to fill the leadership gap left by the United States and mobilize states to respond to the threat posed by Trump’s policies. The European Commission indicated that it was determined to do ‘whatever is necessary’ to protect and defend the rules-based multilateral trading system, as one official stated.⁶⁷ The EU made addressing the Appellate Body crisis the cornerstone of its strategy.

Beginning in late 2018, in an effort to stave off the impending Appellate Body collapse, the EU and other WTO members pushed for a negotiated solution to the impasse, tabling a dozen proposals for practical reforms to address US concerns—all of which were rejected by the United States.⁶⁸ A prolonged period of intensive

⁵⁷ WTO Dispute Settlement Body, minutes of meeting, 29 July 2020, WT/DSB/M/443, p. 29; WTO DSB, minutes of meeting, 28 August 2020, WT/DSB/M/444, p. 19, 40.

⁵⁹ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 39.

⁶² WTO Dispute Settlement Body, minutes of meeting, 29 July 2020, WT/DSB/M/443, p. 29.

⁶³ WTO Dispute Settlement Body, minutes of meeting, 29 July 2020, WT/DSB/M/443, p. 28; WTO Dispute Settlement Body, minutes of meeting, 28 Aug. 2020, WT/DSB/M/444, p. 19.

⁶⁸ See e.g., ‘Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council’, 26 Nov. 2018, WT/GC/W/752; ‘Communication from the European Union, China and India to the General Council’, 26

consultations (known as the Walker Process) led to a draft General Council decision on Appellate Body reform in November 2019, intended to address the procedural concerns raised by the United States, while safeguarding the essential elements of an effective, independent, two-tier dispute settlement system. Yet this too was rejected by the United States, which blocked consensus on the draft decision.

The EU-led multi-party interim appeal arbitration arrangement (MPIA)

With Washington blocking attempts to resolve the Appellate Body crisis, the EU launched efforts to find a means to enable the dispute system to continue to function without the United States. It began by approaching Canada, then Norway, before mobilizing a larger group of states. Canada has traditionally been a major actor at the WTO, as a member of the 'Quad' (along with the United States, the EU and Japan), and leads the Ottawa Group on WTO reform.⁶⁹ In July 2019, the EU announced an agreement with Canada to establish a bilateral interim appeal arbitration arrangement for WTO disputes. This arrangement would apply to disputes between the two parties and would 'replicate as closely as possible' the practices and procedures of the Appellate Body.⁷⁰ Appeals would be heard by three former Appellate Body members, selected by the WTO director-general, under the same process as the Appellate Body.⁷¹ In October 2019 the EU signed a second, similar agreement with Norway, which has close ties with the EU through its membership of the European Economic Area.⁷²

Building on, and seeking to broaden, these agreements, at the January 2020 World Economic Forum in Davos, the EU and 16 other countries announced plans to negotiate a multi-party interim arrangement for appealing trade disputes.⁷³ The EU spearheaded the initiative, seeking the participation of a critical mass of countries and specifically targeting the largest traders and most frequent users of the WTO dispute settlement system. In March 2020, under the leadership of the EU, states agreed on the MPIA, intended to replicate, broadly, the practices and procedures of the Appellate Body. It will remain in place until a permanent solution to the Appellate Body crisis is found and the Appellate Body is fully operational once again. The interim appeals arrangement will apply only to participating states but is open to all WTO members to join. By December 2020, over 50 countries had agreed to participate.⁷⁴ The MPIA now encompasses most major users of the WTO dispute settlement system aside from the United States, including the EU, Australia, Brazil, Canada, China and Mexico.

Many other states have indicated their interest in joining the MPIA, but have been awaiting the outcome of the US election and signals of the Biden administration's intentions regarding Appellate Body appointments. There are, however,

Nov. 2018, WT/GC/W/753.

⁷³ In addition to launching the MPIA, the EU has also enhanced its own trade enforcement powers. Immediately after the Appellate Body ceased to function in December 2019, the European Commission introduced an amendment to its trade enforcement law (Regulation 654/2014) that would enable the EU to impose retaliatory tariffs on countries that block the adoption of a panel ruling by appealing to the paralysed Appellate Body. The amendment was approved and officially adopted in early 2021.

some notable absentees. While expressing support for the MPIA, Japan and South Korea have been reluctant to join for fear of antagonizing the United States, their primary security guarantor.⁷⁵ India recently lost a major US\$7 billion export subsidy dispute but was able to block the panel ruling by appealing into the void; with several additional panel rulings expected against it in the near future, it appears to have decided that the absence of a functional Appellate Body serves its immediate interests. Despite the absence of these three states, the MPIA has nonetheless achieved a critical mass that comprises most of the world's major trading states and most active users of the WTO DSM.

The EU and other MPIA participants have indicated that their 'clear priority' is to find a lasting solution to the Appellate Body crisis; but until such a solution is found, the MPIA represents the best available alternative.⁷⁶ It provides a means for appeals to be heard while the WTO's formal appeals process is unable to function, allowing the essential features of WTO appellate review to be preserved. The arrangement is intended to mirror both the substantive and the procedural aspects of the Appellate Body. It establishes a pool of ten arbitrators to hear appeals against WTO dispute settlement panel reports. As with the Appellate Body, each appeal is heard by three arbitrators, whose decision is binding on states. The MPIA also introduces novel features that reflect the EU's proposals for Appellate Body reform and address US criticisms of the Appellate Body, including a 90-day deadline for arbitrators to decide appeals and a constraint on arbitrators requiring them to address only issues that are pertinent to the resolution of the dispute and have been raised by the parties involved.

The MPIA became operational in August 2020, after the participants notified the WTO Dispute Settlement Body that they had agreed on the appointment of ten arbitrators. The MPIA arbitrators have extensive experience with WTO disputes: virtually all have served as panellists or arbitrators, or in the divisions of the WTO secretariat that assist panels and the Appellate Body.⁷⁷ Parties to four WTO disputes have already indicated they will proceed under the MPIA, showing that states are willing to use the mechanism. These are between Canada and Australia over wine (DS537); between Canada and Brazil over aircraft (DS522); between Costa Rica and Mexico over avocados (DS524); and between Colombia and the EU over anti-dumping duties (DS591).⁷⁸

Strikingly, the EU-led MPIA was achieved, as one participant stated, in 'a very short period of time'.⁷⁹ The Appellate Body was rendered inoperable in December 2019. By January 2020, the EU had mobilized a group of states committed to creating an alternative interim arrangement, the terms of which were agreed by March 2020. By August 2020—just nine months after the Appellate Body had ceased functioning—the MPIA was operational. Given the often glacial pace of

⁷⁵ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 48.

⁷⁶ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 39.

⁷⁷ Lester, 'Can interim appeal arbitration preserve the WTO dispute system?'

⁷⁸ DS537: *Canada—measures governing the sale of wine*; DS522: *Canada—measures concerning trade in commercial aircraft*; DS524: *Costa Rica—measures concerning the importation of fresh avocados from Mexico*; DS591: *Colombia—anti-dumping duties on frozen fries from Belgium, Germany and the Netherlands*.

⁷⁹ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 40.

WTO negotiations—the Uruguay Round, for instance, which created the WTO DSM, took eight years, while the Doha Round, which began in 2001, has still yet to be concluded 20 years later—the speed with which the MPIA was created is itself remarkable. This reflected the acute sense of urgency among its participants, and the importance they accorded to seeking to preserve the WTO’s DSM.

The EU succeeded in building a major coalition of like-minded states to support the launch of the MPIA. It gained followers because it took the initiative in proposing a concrete response to the Appellate Body crisis that other states were eager to support. Participants joined the initiative, as one stated, because ‘they shared the same objective’ of preserving the WTO’s dispute settlement system.⁸⁰ Switzerland, for instance, welcomed the MPIA as ‘an important instrument in strengthening the security and predictability of the multilateral trading system in the current context’.⁸¹ According to Guatemala, the MPIA was the result of ‘cooperation and pragmatism’ and was aimed at ‘preserving the fundamental characteristics on which the multilateral rules-based system rested’.⁸² With the WTO facing an ‘unprecedented crisis’, the MPIA was seen, as China put it, as essential to promoting ‘confidence’ in the WTO’s dispute settlement mechanism and ‘provid[ing] security and predictability to the multilateral trading system’.⁸³ States thus welcomed the EU’s leadership in creating the MPIA because it was seen as a critical effort to preserve the continued effectiveness of the WTO dispute system and maintain the rule of law in the global trading system.

The MPIA also held symbolic importance as a show of collective resistance to the US attack on the multilateral trading system. With the core principles of the liberal order under threat, the MPIA provided a means for states to signal their dissatisfaction with US actions while simultaneously demonstrating their political commitment to international cooperation and the rule of law. The MPIA was about ‘showing responsibility’, as Norway put it: the MPIA ‘provided grounds for renewed trust in international cooperation’, and also served ‘to underline that the United States could not deliberately bring down the Appellate Body and then expect the Membership to gradually and implicitly accept the status quo’.⁸⁴ The MPIA was seen, to quote Guatemala, as ‘an excellent example’ of states’ ‘ability to conclude mutually beneficial agreements’ at the WTO.⁸⁵ Moreover, since the MPIA mirrors the workings of the Appellate Body but also incorporates some responses to US criticisms, it served to signal that such criticism could be dealt with by reforming procedures, rather than abandoning the system altogether as the United States had done. With the future of the multilateral trading system in jeopardy, the MPIA represented an important symbol of support for the system. Nor was this just ‘cheap talk’ or empty statements in support of multilateralism; this was states taking concrete actions to create a new institutional mechanism—

⁸⁰ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 40.

⁸¹ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 48.

⁸² WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 40.

⁸³ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 40.

⁸⁴ WTO Dispute Settlement Body, minutes of meeting, 29 July 2020, WT/DSB/M/443, p. 29.

⁸⁵ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, p. 40.

the MPIA—and committing to be bound by its rulings.

The MPIA represents a club of committed multilateralists, consisting of a diverse group of states, varying in economic size, importance in world trade and levels of development. It includes developed, developing and the least developed countries, which is significant given the deep North–South divisions that have often plagued WTO negotiations.⁸⁶ Importantly, it includes the world's two largest trading powers besides the United States—the EU and China. The fact that the EU—the world's second-largest economy after the United States—signalled its active support for the liberal trading order by leading the MPIA gave the new mechanism added significance. There is widespread fear that the Appellate Body crisis portends the collapse of the rules-based multilateral trading system, which would then be replaced by far more chaotic global trade relations governed by the use of raw power. Given its considerable economic might, the EU would be in a far better position to cope with such a power-based system than the vast majority of individual states. But in leading the MPIA, the EU indicated that it was striking a different path from the United States, and throwing its weight behind international cooperation and the rule of law.

China's participation in the MPIA: following the EU's lead

China's economic weight has made it an important partner in the MPIA. With China's participation, the MPIA encompasses two of the world's three largest economies, helping to underscore America's isolation. But China is a follower rather than a leader in the initiative to create the MPIA. The interim arrangement originated with the EU, and it is the EU that mobilized other states and persuaded them to participate. In its participation in the MPIA, China is following the EU's lead.

In fact, China took pains to indicate that it was *not* leading the MPIA, in order to ensure that its participation did not undermine support for the initiative. In its official statement to the Dispute Settlement Body, China specifically sought 'to clarify that the MPIA had been initiated by the EU'.⁸⁷ Other participants, China indicated, including itself, 'had shared the EU's views, had joined the initiative, had participated in the negotiations and had endorsed the arrangement'. These participants 'accepted, appreciated and supported the EU's leadership'. The United States—which, unsurprisingly, strongly opposed the MPIA—sought to cast aspersions on the initiative by repeatedly referring to it as 'the China–EU arrangement'. But the parties to the MPIA refute this characterization, indicating that China was merely one among many participants in the initiative instigated and led by the EU.⁸⁸

Unlike the EU, China has not put forward, or led states in, any concrete

⁸⁶ Hopewell, 'The BRICS—merely a fable'.

⁸⁷ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, pp. 39–40.

⁸⁸ WTO Dispute Settlement Body, minutes of meeting, 29 June 2020, WT/DSB/M/442, pp. 38–42; author interviews with WTO negotiators, Oct. 2020, Jan. 2021; Hannah Monicken, 'Interim WTO appellate deal notified to DSB', *Inside US Trade* daily report, 1 May 2020.

initiative directed at preserving the rules-based trading system and defending it from the US threat. This is consistent with its previous behaviour at the WTO. Throughout its 20 years of WTO membership, China has consistently shied away from a leadership role. While other states have used the leadership of coalitions to enhance their power at the WTO, China has participated in coalitions but never as a leader; many countries view China's export capacity as a competitive threat and would be reluctant to support its leadership, and China has feared that a bid for leadership would provoke a backlash.⁸⁹

Despite its keen interest in maintaining the established trading order, China is at present unwilling or unable to lead system-preserving initiatives at the WTO. China's capacity for leadership is undermined by its extensive use of protectionist trade policies—including heavy subsidies, import and export restrictions, discrimination against foreign firms, forced technology transfer and violations of intellectual property rules—which are widely seen as a violation of the free trade principles of the WTO. Moreover, China, like the United States, has engaged in increasingly aggressive unilateral trade actions, weaponizing trade as an instrument of economic coercion against weaker states, including arbitrarily blocking Canadian imports (and imprisoning two Canadian citizens) in retaliation for the extradition of a Huawei executive to face fraud charges in the United States, and blocking Australian imports in retaliation for its calls for an independent inquiry into the COVID-19 outbreak.

As a result, China lacks credibility as a defender of multilateralism, free trade and the rule of law, and is therefore not considered a convincing leader of efforts to preserve the liberal trading order. China is widely seen as committed to the rules-based multilateral trading system in only a partial and self-serving fashion, frequently violating the rules of the WTO when in its interests to do so. Its actions are viewed with considerable distrust and suspicion, impeding its ability to gain followers. Moreover, China has been the primary target of US trade aggression and is embroiled in a growing rivalry with the United States frequently characterized as a 'new Cold War'.⁹⁰ Other countries do not want to be seen as taking sides with China against the United States; not only do many share Washington's concerns about China's trade practices, they are also wary of damaging their relations with the United States.

Overcoming internal divisions

The EU successfully managed to overcome significant internal divisions in order to create the MPIA. Member states were deeply divided over how the EU should respond to Trump, and there was considerable internal debate about whether the EU should move forward with the interim arrangement. Although the majority of EU states supported the initiative, some—Denmark, Germany, Latvia, Luxem-

⁸⁹ Hopewell, 'The BRICS—merely a fable'.

⁹⁰ Xiangfeng Yang, 'The great Chinese surprise: the rupture with the United States is real and is happening', *International Affairs* 96: 2, 2020, pp. 419–38.

bourg and the Netherlands—expressed concerns that it would anger the Americans and undermine the EU's relationship with the United States. These states feared that moving forward with an interim appeals arrangement could provoke retaliation from Washington, or even cause the United States to abandon the WTO altogether. As a representative from one EU state put it, the MPIA risked 'pushing the Americans over the final edge. They are blocking the WTO but they haven't left the building yet.'⁹¹ Critics were particularly concerned about the danger that the EU would be perceived as partnering with China against the United States, and argued that the EU should instead try to work more closely with the United States to pursue WTO reform.

The EU negotiated these tensions by simultaneously pursuing both strategies. Alongside its efforts to create the MPIA, the EU also worked with the United States and Japan to launch a trilateral initiative directed at reforming WTO rules to create stronger disciplines on industrial subsidies, state-owned enterprises and forced technology transfer—all of which are targeted at tackling China's model of state-sponsored capitalism and its trade practices. Working in partnership, the EU, United States and Japan have proposed changes to WTO rules to expand the list of prohibited industrial subsidies and establish rules to address subsidies that cause overcapacity. The same trilateral group has also proposed shifting the burden of proof by requiring states to demonstrate that their subsidy programmes are not distorting trade or contributing to overcapacity, as well as advocating more stringent notification standards for industrial subsidies. They have also called for an expanded definition of the term 'public body', maintaining that the Appellate Body's excessively narrow interpretation of the term has undermined the effectiveness of WTO subsidy rules *vis-à-vis* China.

The EU has thus walked a delicate line in managing its approach to both the United States and China at the WTO, and navigating growing US–China conflict within the trade regime. The EU has refused simply to ally itself with one side or the other. Instead, it has sought to advance its interests through targeted, issue-specific partnerships with those who share its interests and objectives—strategically partnering with China and other major traders to address the Appellate Body blockage created by the United States, while simultaneously partnering with the United States and Japan to challenge China's trading practices.

Conclusion

At a critical juncture in the future of the liberal trading order, the MPIA represents an important demonstration of leadership by the EU. In the face of an American hegemon openly hostile to multilateralism and the rules-based trading system, and actively blocking the operation of the Appellate Body, the EU stepped into the void, mobilizing states, working to find a solution to the Appellate Body crisis, and successfully spearheading the MPIA as a means to maintain a two-tier system

⁹¹ Jakob Hanke Vela and Barbara Moens, 'EU rebels fight Commission plan to build WTO court without America', *Politico*, 28 Nov. 2019.

of independent judicial review in WTO disputes. In contrast to its failed efforts to exercise leadership in the past, in this case the EU had a clear vision and was able to overcome internal divisions, advance a concrete initiative and marshal the support of other states. Less than a year after the collapse of the Appellate Body, the EU had effectively established a new international court, with a slate of arbitrators in place and a docket of cases in line to be heard, and the backing of many of the largest traders and users of the WTO dispute settlement system. The EU-led interim appeals arrangement is a key component of the effort to make global trade governance less dependent on American leadership and more resilient in the face of US attempts to undermine the rules-based multilateral trading system.

Despite scepticism about the EU's capacity for leadership, and speculation that China—the state most frequently identified as a hegemonic rival to the United States—was seeking to position itself as an emerging leader of the global trading order, it is the EU that has taken the most significant, concrete steps to address the crisis at the WTO and maintain the functioning of the rules-based multilateral trading system. In other words, it is the EU, not China, that is behaving as a system-preserving power at the WTO. This highlights important differences in the respective capacities of China and the EU to exercise leadership within the established global order. In the face of the current threat to the liberal trading order, China is not advancing system-preserving initiatives. Despite its keen interest in maintaining the existing global trade regime, China is unable to play the same role in efforts to maintain and preserve the system as the EU. It lacks trust and credibility as a champion of the liberal order, a deficit which impedes its ability both to advance initiatives and to attract the support of followers.

The MPIA represents an important instance of non-hegemonic cooperation in the multilateral trading system. Through its leadership of the MPIA, the EU has played a crucial stabilizing role in the trading system. The EU's action in responding to the Appellate Body crisis represents a form of defensive leadership—seeking to preserve the established order. It remains to be seen, however, whether the EU will be able to exercise more proactive leadership in efforts to reform the WTO, which require consensus among states on how the rules and functioning of the institution should be altered.

To be clear, the MPIA is a 'stopgap' measure intended to remain in place only until a permanent solution to the Appellate Body crisis can be found.⁹² It replicates the functioning of the Appellate Body for a critical mass of WTO members, but it does not provide a permanent resolution to the crisis. The most significant limitation of the MPIA is, obviously, that it does not include the world's largest economy and the single biggest user of the dispute settlement system: the United States. This was inevitable, however, given that US opposition was what rendered the Appellate Body inoperable in the first place. Under these circumstances, the EU-led MPIA represented the best outcome that could be achieved. As former WTO Director-General Pascal Lamy put it, '[It's] better to have a WTO without the US than no WTO at all, at least as far as the dispute settlement system is

⁹² WTO Dispute Settlement Body, minutes of meeting, 29 July 2020, WT/DSB/M/443, pp. 25, 41.

concerned.⁹³ While by necessity partial and imperfect, the MPIA was probably the best, and indeed the only, possible way to maintain an appeals process for trade disputes, in order to salvage the WTO's DSM in the face of active efforts by the most powerful state in the system to destroy it.

It is not clear if or when a resolution to the Appellate Body crisis will be found. Despite President Biden's professed commitment to multilateralism, his administration has continued to block Appellate Body appointments. Given longstanding US concerns about the Appellate Body and the failure of the WTO to discipline China's trade practices, there are no expectations of a quick fix to the Appellate Body crisis. Moreover, the Biden administration has not yet given any concrete indication that it intends to repeal Trump's unilateral trade measures (such as the Section 232 tariffs on steel and aluminium and Section 301 tariffs on China); so the United States may remain in violation of global trade rules. If so, the Biden administration may determine that it is in America's interest that the Appellate Body remain inoperable, enabling Washington to continue blocking WTO panel rulings by appealing into the void. While the MPIA represents an important step in the effort to maintain a functional WTO dispute settlement mechanism, only time will tell whether the WTO itself can in fact be 'saved'.

⁹³ Hannah Monicken, 'Former director-general Lamy: a WTO without the US better than none', *Inside US Trade* daily report, 19 June 2020.